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In the Supreme Court of the United States

October Term, 1939

No. 613

THE UNITED STATES OF AMERICA, *Petitioner*

v.

GEORGE S. BUSH & CO., INC., *Respondent*

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I) **In general:** This case relates to canned clams imported from Japan and entered for customs purposes at the port of Seattle on April 6, 1936 (R. 4). The tariff act of June 17, 1930, c. 497, sec. 1, 19 USC 1001, par. 721 (d), provides for "clams . . . packed in air-tight containers, 35 percent ad valorem." Normally this ad valorem duty would be applicable to the provision in section 402 (a) of said act, 19 USC 1402 (a), that:

> For the purposes of this Act the value of imported merchandise shall be—
>
> (1) The foreign value or the export value, whichever is higher.

But under the flexible-tariff law contained in section 336 of said act (appendix, i), and in conformity with a proclamation by the President (R. 37), these clams were appraised on the much higher basis of the American selling price of domestic canned clams in the principal market of the United States in accordance with section 402 (g) of said act (appendix, vi).

On successive appeals (R. 3, 47) by respondent-importer, aforesaid appraisal at the American selling price was affirmed by a single judge of the Customs Court (R. 39-47) and by the second division of that court (R. 48-59), those proceedings being under section 501 of said tariff act, 19 USC 1501. On appeal to the Court of Customs and Patent Appeals (R. 1) the decision of the Customs Court was reversed (R. 61-79).

At the trial in the Customs Court (R. 5) it was stipulated (R. 5-6) that there was no foreign value and that, if the merchandise were dutiable at export value, that value would be $2.5107 and $3.3598 per case respectively for 5-ounce and 8-ounce cans (R. 4-5). The American selling prices used by the appraiser as his basis of appraisal were $4.40 and $6.40 per case respectively (R. 5).

In addition to the President's proclamation (R. 37), the record also contains a "Report to the President" (R. 9), wherein the United States Tariff Commission set forth the finding that the then existing duty did not "equalize the difference in the costs of production of . . . the domestic articles and the like or similar foreign articles produced in the principal competing countries" (par. (a), R. 17); and that "the rate of duty necessary to equalize such difference is 35 percent ad valorem based upon the American selling price of the domestic article" (par. (c), R. 17).

This report contains the facts, or as stated by petitioner (p. 12 of brief) is "a complete summary of the infor-

mation" ascertained by the Tariff Commission and reported to the President. These facts may be briefly stated as follows:

On June 28, 1932 the Tariff Commission instituted an investigation of the differences in cost of production of canned clams produced in the United States and in the principal competing countries, for the purpose of ascertaining whether the duties then applicable to such merchandise were sufficient to equalize any difference in cost of production (R. 11). Such an investigation is authorized by section 336, tariff act of 1930, chap. 497, 46 Stat. 696, 19 USC 1336 (Appendix, i).

By the terms of this statute the commission is directed to ascertain certain enumerated facts, including the cost of production of foreign and domestic articles for *"a representative period,"* and to compare any difference between such costs with the amount of duty then being collected on the article for the purpose of determining whether such duties are sufficient to equalize the differences, and, if not, what rate of duty would be sufficient.

In the course of this investigation the commission selected the years 1931 and 1932 as the "representative period" for the domestic article (R. 14), and accepted the invoice prices or values of the foreign clams imported at San Francisco during the 22 months from December 1, 1931 to September 30, 1932 as representative of the foreign cost of production (R. 27). These prices were expressed in foreign currency, namely, the Japanese yen, and of course required conversion into United States currency. The commission then concluded that if the invoice prices were converted at the rates of exchange in effect at the time of each exportation the amount in dollars would not be "representative of the present or probable future invoice values in terms of dollars" (R. 14, par. 6). Thereupon the commission converted the foreign currency into

United States dollars at the average rate of exchange for the year 1932 (R. 14).

It is this action of the commission, also others which will subsequently be referred to, that respondent complains of, and the question of the legality thereof constitutes the main issue here.

II) **The basic statute and its salient points:** The authority for the Presidential proclamation and for the Tariff Commission's findings is derived from section 336, tariff act of 1930 (appendix, i).

By this law Congress delegated to the President the power to proclaim changes in duties. The policy of Congress is to permit such adjustments in accordance with the conditions specified by the statute, in order to "equalize the difference in cost of production of domestic articles and the like or similar foreign article." Also, it is clear that Congress intended that the Tariff Commission should proceed in a particular manner when carrying out its functions under this statute. These requirements manifestly include the following conditions:

1) The Tariff Commission must investigate differences in cost of production of the domestic and the foreign article.

2) In the course of this investigation hearings must be held, reasonable public notice given, and reasonable opportunity afforded to interested parties to be present, to produce evidence, and to be heard.

3) The commission must report to the President the results of the investigation and its findings with respect to differences in costs of production.

4) The commission must specify such changes in duties as are shown by the investigation to be necessary to equalize differences in cost of production.

After these conditions are complied with, the President is authorized (sec. 336-c) to approve the changes specified

in the report of the commission, "if in his judgment such . . . changes are *shown by such investigations of the commission* to be necessary to equalize the differences in cost of production."

In authorizing the President so to act Congress clearly limited his power to that of approving or rejecting the particular changes specified by the commission. Also, unlike the provision of a similar previous statute enacted in 1922 (sec. 315, tariff act of 1922, chapter 356, sec. 315, 42 Stat. 858, 941-43, 19 USC, secs. 154-9, appendix, p. viii), the President is strictly limited to consideration of the facts "shown by such investigation of the commission," and may not, as he could under the prior act, consider in addition to the data submitted to him by the Tariff Commission, any other facts he deemed relevant. *Feltex Corp. v. Dutchess Hat Works*, 21 CCPA 463, 476; *Zeiss v. United States*, 23 CCPA 7, 14; *Akawa v. United States*, 23 CCPA 75, 80.

As to the commission's actions and powers in finding cost of production and the changes necessary to equalize any differences in costs, Congress was equally specific in several particulars, as follows:

a) The "cost of production" which the commission investigates is limited by section (h) (4) to such cost "for a period which is representative of conditions in production of the article."

b) If such cost is not readily ascertainable the commission is authorized by section (e) (3) to "accept as evidence thereof, or as supplemental thereto":

> The weighted average of the invoice prices or values *for a representative period.*

c) The commission must ascertain the "duties expressly fixed by statute" and compare this amount with the differences in costs of production (sec. 336 (a) (4)).

d) The commission must specify in its report to the President *the changes which are shown by the investigation* to be necessary to equalize the differences in cost of production (sec. 336 (a)).

Therefore, so far as ascertainment of cost of production is concerned, Congress specifically directed the Tariff Commission to determine both foreign and domestic costs "*for a period which is representative of conditions in production of the article.*" Further, as to foreign articles, Congress authorized the commission, in cases where the statutory cost of production was not readily ascertainable, to accept as evidence thereof the weighted average of the invoice prices *for a representative period.*

In addition, Congress directed the commission to ascertain the "duties expressly fixed by statute," in order to determine what changes, if any, were necessary.

III) **Respondent's contentions**: Stated briefly, respondent contends that the proclamation referred to was illegal and void, because:

a) Neither the Tariff Commission, nor the President in his review of the facts submitted by the commission, complied with the provisions of section 336, tariff act of 1930, when they ascertained (1) the foreign cost of production, (2) the differences in cost of production between the foreign and domestic article, and (3) the "duties expressly fixed by statute."

b) If the procedure followed by the commission and the President is not in violation of the terms of section 336, then the statute is an unconstitutional delegation of legislative power in that it grants to an administrative agent discretion as to what the law shall be.

In particular, it is contended that, although the commission reported the foreign costs of production to the President as evidenced by a "weighted average of the invoice prices or values for a representative period," the

proclamation is invalid because based upon an investigation which was not made in accordance with the statute. More specifically, respondent's position is as follows:

1) Although the commission investigated prices or values for a selected representative period, namely, December 1, 1930 to September 30, 1932, the conversion of these prices from foreign currency (Japanese yen) into dollars *at the average rate of exchange for the year 1932* was illegal, for by this action the commission obtained a value which did not represent the cost of production referred to in the statute, i.e., the cost for the selected "representative period."

2) In violation of section 336 (a) the commission failed to ascertain the amount of "duties expressly fixed by statute" and to compare this amount with the differences in cost of production. In respect to this point it is claimed that, although the commission found that "foreign value" was dutiable value (R. 16, par. 11), it disregarded section 402 (*c*) of the tariff act of 1930 (appendix, p. v), requiring the date of exportation to be taken in ascertaining foreign value, and also disregarded section 522 of said act (appendix, p. viii) requiring foreign currency to be converted to dollars in a particular manner.

3) The commission failed to compare the amount of duty based on the American selling price as defined in section 402 (g), tariff act of 1930 (appendix, p. vi), with the difference in cost of production computed as of the same period of time.

4) The commission did not ascertain the required facts from "the investigation," but ascertained them by use of an unauthorized and illegal currency-conversion factor.

5) The commission did not specify in its report to the President such increase or decrease in rate of duty or change in basis of value as was "shown by the investigation" to be necessary to equalize the differences in cost of production.

IV) **Petitioner's contentions:** Briefly summarized, petitioner's claims are as follows:

a) The Customs Court cannot review the facts and reasoning upon which the Tariff Commission based its recommendation to the President.

b) Although foreign cost of production must be ascertained for "a representative period" and compared with domestic cost of production, yet, having once ascertained the foreign cost in terms of foreign currency, the Tariff Commission is free to convert such cost into United States currency in any manner it may deem appropriate.

V) **The court's power to review:** Under a statute of similar purpose but of different context, namely, section 315, tariff act of 1922, this court held, in *Hampton v. United States*, 276 US 394, 409, that:

> The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Consequently, as the Tariff Commission and the President act under section 336 as agents of Congress invested with power to change existing duties, it follows that their actions may be the subject of judicial review directed towards determining whether compliance was had with the terms of the statute granting them the powers which they exercised.

This principle of law is well recognized and has been frequently applied in litigation involving property rights, and although there have been few, if any, customs cases in this court wherein the point has been specifically passed upon, questions involving similar points have been decided, as follows:

a) *Robertson v. Frank,* 132 US 17, 24; *Muser v. Magone,* 155 US 240, 247; *United States v. Passavant,* 169 US 16, 21, holding that, although appraisement of merchandise was conclusive and not subject to judicial review, yet, if the appraiser proceeded upon a wrong principle, contrary to law or added illegal items to the value, or transcended the powers conferred by statute, his appraisement was subject to impeachment.

b) *Waite v. Macy,* 246 US 606, involving an action to enjoin the Board of Tea Appeals from applying to imported tea certain tests of purity prescribed by the Secretary of the Treasury, and holding (pp. 608-9):

> Upon them (the facts) the plaintiffs (the appellees) say that the government is attempting to apply criteria not allowed by law. The government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of a board.
>
> No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 US 466, United States v. United Verde Copper Co., 196 US 207, 215, United States v. George, 228 US 14, 21.
>
> * * * * * * *
>
> The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 US 694), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. E. Co., 216 US 538, 544).

In its brief filed herein the United States contends (p. 8) on authority of *Norwegian Nitrogen Products v. United States,* 288 US 294, that there can be no review of the facts and reasoning on which the judgment of the Tariff Commission and the President was based.

This decision is not an authority for such a contention. The question in that case, as stated by the court (p. 303) was:

> The decision of this case hinges upon our answer to the question whether the petitioner has been "heard" in accordance with the statute.

In deciding this question, which was the sole one involved, this court considered the legislative history of the flexible-tariff system, the Congressional method or practice of tariff legislation, and the history of the Tariff Commission and similar bodies, and then concluded that an interested party did not have the right of acess to all data collected by the commission, or the right to cross-examine investigators and competitors upon such data. In the course of its opinion the court compared the procedure of the commission, under the tariff act of 1922, with that of other bodies such as the Interstate Commerce Commission, and stated (p. 318) that "the Tariff Commission advises; these others ordain."; also (pp. 318-9):

> What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate of duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment *if the prescribed forms of legislation have been regularly observed.*
>
> * * * * * * *

This decision, stating that the action of the President is not subject to impeachment "if the prescribed forms of legislation have been regularly observed," and relating to a statute of similar purpose to the present statute, supports respondent's contention that the Customs Court may here review the actions of the Tariff Commission to deter-

mine whether the conditions of the statute, or "the prescribed forms of legislation," were regularly observed.

However, as to other facts referred to in the opinion, it should be noted that section 315 differed in material respects from the present section 336, and that therefore not all that was said there is applicable to the present law or to the instant case. As was said by the Court of Customs and Patent Appeals in *Moss v. United States*, 26 CCPA, 381, 385, 103 F. (2d) 395, involving an action arising under section 336, tariff act of 1930:

> The case (Norwegian Nitrogen Products v. United States) arose under the flexible provisions of the 1922 act; and much was said in the course of the opinion that has no application to proceedings under the 1930 act, which, as heretofore pointed out, limits the President in the exercise of his judgment to a consideration of the facts developed before the commission in the course of its investigation.

Since the creation of the Court of Customs and Patent Appeals in 1910 very few customs cases have been before this court, and only two of these, *Hampton v. United States*, supra, and *Norwegian Nitrogen Products v. United States*, supra, have pertained to the so-called flexible-tariff provisions first enacted in 1922. Since 1922 the Court of Customs and Patent Appeals has passed upon several cases involving various claims as to the invalidity of Presidential proclamations issued either under section 315, tariff act of 1922, or section 336, tariff act of 1930, and among its decisions is found the following matter relevant to the question of judicial review referred to above.

a) *Foster v. United States*, 20 CCPA 15, 23 (relating to section 315, tariff act of 1922):

> The question of whether the President has proceeded in conformity with the law in proclaiming certain changes in customs duties is, in our opinion, a justiciable one which may be adjudicated in the proper forum.

b) *Fox River Butter Co. v. United States*, 20 CCPA 38, 45 (relating to section 315, tariff act of 1922; certiorari denied, 287 US 628):

> Accordingly, if the President had increased the rates of duty provided for in paragraph 710 without a *legal* investigation by the Tariff Commission, the assessment by the collector of such duties might be challenged by protest, and the court below and, on appeal, this court have authority to determine the issues raised thereby. The Congress, of course, contemplated that the Tariff Commission would make full, fair and impartial investigations to the end that the President might be fully advised and the purpose of the law consummated.

c) *United States v. Sears, Roebuck & Co.*, 20 CCPA 295, 301 (certiorari denied, 290 US 633):

> If the President in the case at bar went beyond or contrary to, or did not observe the limitations and conditions of, said section 336 of the tariff act of 1930, the legality of his order and proclamation may be reviewed by us on appeal.

d) *Hampton v. United States*, 14 CCPA 350, 369 (affirmed, 276 US 394):

> But when, in the performance of his duties under this section (315, tariff act of 1922), the President proclaims a change of duty, if, in so doing, *he acts beyond the law* or fails to comply with its express mandate, then we can not doubt but the person aggrieved thereby may find adequate relief in the courts.

e) *Mosi v. United States*, supra, 26 CCPA 381, 382-3, 103 F. (2d) 395 (relating to section 336, tariff act of 1930):

> It is true, as pointed out by counsel for the government, that the Customs Court is given no direct right of review over action of the Tariff Commission. This does not mean, however, that it is without power to con-

sider the legality of increase of duties resulting from the commission's action. The court is a court of law, and it is granted full power to relieve against illegality in the assessment or collection of duties. 19 USCA 1515, 1518. If relief may not be had before it against illegal action under the flexible-tariff provisions, relief may not be had anywhere; for its jurisdiction in such matters is exclusive. It is the tribunal established by Congress in the provision of a complete system of corrective justice for the administration of the customs laws, and questions involving the validity of official action in the imposition and collection of duties are properly cognizable before it to the exclusion of other courts. Cottman Co. v. Dailey, 4th cir., 94 F.(2d) 85, 88; Riccomini v. United States, 9th cir., 69 F.(2d) 480, 484; Gulbenkian v. United States, 2d cir., 186 Fed. 133, 135; Nicholl v. United States, 7 Wall. 122, 130. There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligation to decide cases before them according to law. See Shields v. Utah Idaho Cen. R. R. Co., 305 US 177, 59 S. Ct. 160; Crowell v. Benson, 285 US 22, 58-59; United States v. Passavant, 169 US 16; Smelting Co. v. Kemp, 104 US 636, 641; United States v. Haviland & Co., 2d cir., 177 Fed. 175.

Petitioner argues (p. 14) that by this action respondent seeks a review of the facts and reasoning upon which the judgment of the President was based. However, this is not the case. Respondent asks this court to determine whether, *in law*, the evidence upon which the commission's conclusions were based was competent; whether the commission ascertained, as required by law, the foreign cost of production as evidenced by the "weighted average of

the invoice prices or values *for a representative period,*" and whether the commission ascertained "the duties expressly fixed by statute," in order to compare them with the differences in cost of production. In other words, respondent contends that such proceedings are necessary parts of a legal investigation, and that under section 336 a legal investigation is a condition precedent to a lawful proclamation.

VI) **Legal investigation**: As to what constitutes "legal investigation" by the Tariff Commission, and "proceeding in conformity with law" by the President, the following decisions are pertinent.

a) *Foster v. United States*, 20 CCPA 15, 22, 25-6 (emphasis added):

> The Supreme Court, in affirming our judgment in the case last cited, speaking through Chief Justice Taft, called attention to the fact that the President, in performing his duties under said section 315, was acting as a fact-finding agency of the Congress, carrying out "an intelligible principle" provided by Congress in the said act, *and could exercise no discretion by which he might vary the will of the legislative body, as expressed in the statute.*
>
> . . . . . .
>
> We are also unable to agree with counsel for the government that the mere recital by the President in his proclamation that he has complied with the law is conclusive of that fact. Of course, in the absence of proof to the contrary, it will be presumed that he complied with the conditions of the statute. But this does not preclude the party affected from establishing, by proper, material, and competent evidence, that such conditions have not been complied with. To hold that this might not be done would be to give to the President the sole power to pass upon the legality of his acts.
>
> . . . . . .

If he proclaimed a change in rates on an article of commerce without a preceding investigation of differences in costs of production of such article by the Tariff Commission, of which hearing public notice, and a reasonable opportunity to parties interested to be present, to produce evidence and to be heard, had been given, his proclamation and rates of duty fixed would be void.

b) *Zeiss v. United States*, 23 CCPA 7, 14:

The President, although not required by the provisions of section 336, supra, to accept the results or findings reported by the Tariff Commission, is required to limit his consideration of the case to the evidence presented to that body, and to approve the rates of duty and changes specified by it, "if in his judgment such rates (and changes in basis of value) are shown by the investigation to be necessary to equalize such differences in costs of production." Feltex Corp. v. Dutchess Hat Works, 21 CCPA (Customs) 463, T. D. 46957.

For the purpose of the provisions of section 336, supra, the President is the agent of the Congress, and he may not act under those provisions until a legal investigation has been made by the Tariff Commission.

c) *Norwegian Nitrogen Products Co. v. United States*, 20 CCPA 27, 34-5:

Therefore, we think that such an investigation as is indicated by the provision under consideration is a condition precedent to the issuance of a valid proclamation. If no such investigation is had, the proclamation is void, and any duty levied by reason of the same is unwarranted in law.

* * * * * * *

The controlling question before us is: Was there an investigation of the character prescribed by Congress?

d) *Norwegian Nitrogen Products Co. v. United States*, 288 US 294:

> Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.

e) *Fox River Butter Co. v. United States*, 20 CCPA 38, 45:

> Section 315 provided positively that no proclamations should be issued until an investigation had been made by the Tariff Commission. A legal investigation by the Tariff Commission was a condition precedent to the issuance of a lawful proclamation by the President.
>
> * * * * * * *
>
> The Congress, of course, contemplated that the Tariff Commission would make full, fair, and impartial investigations to the end that the President might be fully advised and the purposes of the law consummated.

f) *Moss v. United States*, 26 CCPA 381, 384, 385 (emphasis added):

> The act (section 336) contemplates not merely that the Commission shall conduct an investigation with notice and hearing, *but also that it shall base its findings and recommendations embodied in its report on what is shown by the investigation, and that the President in forming his judgment shall be confined to what is so shown.*
>
> * * * * * * *
>
> This does not mean that the court may review the facts or substitute its judgment for that of the Commission. It means merely that, where the question is properly raised, it must determine whether the Commission acted within the scope of the authority granted it by Congress.

From these decisions it is clear that the Customs Court may declare a proclamation to be void, if it appears that

the commission did not make an investigation such as is provided for by the statute, or that the President acted contrary to the provisions of section 336, or that the commission's actions were not fair and impartial.

VII) **Distinction between tariff acts of 1922 and 1930:** As both decisions by this court in cases pertaining to the flexible-tariff provisions (*Hampton v. United States*, supra, and *Norwegian Nitrogen Products Co. v. United States*, supra), and many of the decisions by the Court of Customs and Patent Appeals in similar litigation, relate to actions brought under the tariff act of 1922 (section 315), rather than the act of 1930 (section 336), the differences in the respective provisions of the two acts must be kept in mind when considering the present case in the light of these decisions.

As stated by this court in *Hampton v. United States*, 276 US 394, 404, the President, under section 315, tariff act of 1922, "was provided with a body of investigators (Tariff Commission) who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments." Also, as pointed out in the same case by the Court of Customs Appeals (14 Ct. Cust. Appls. 350, 362), he was required to determine three things: (a) The principal competing country; (b) cost of production in the United States, and (c) cost of production abroad. Also, although "a very broad latitude was given to the President in making such findings of fact" (p. 362), his mere recital that he had complied with the law was not conclusive of that fact (*Foster v. United States*, supra, p. 25). As to the function of the Tariff Commission it was held that "a legal investigation by the Tariff Commission was a condition precedent to the issuance of a lawful proclamation" (*Fox River Butter Co.*, supra, p. 45), and that, "the commission having made a legal investigation, the President was not limited nor bound by the evidence sub-

mitted to it, as he is under subsection (c) of section 336, tariff act of 1930, . . . but, on the contrary, might, if he saw fit to do so, secure information from any source deemed proper by him" (*Akawo v. United States*, 23 CCPA 75, 80). Therefore, as stated in the *Akawo* case (p. 80):

> The mere fact that the commission may have committed error, . . . so long as its investigation was a legal one, is not of vital consequence so far as the provisions of section 315 are concerned.

Under the tariff act of 1930 a different situation exists and the commission is now charged with determining the following facts under section 336:

1) Differences in cost of production of any domestic article and any like or similar foreign article (section 336-a).

2) Whether "the duties expressly fixed by statute" equalize the difference in cost of production (section 336-a).

3) "Such increases or decreases in rates of duty expressly fixed by statute" as are necessary to equalize such differences (section 336-a).

4) In certain cases (section 336-b), the ad valorem duties based upon American selling price (as defined in section 402-g) of the domestic article which are necessary to equalize such differences.

In determining these facts the commission is empowered to select a "period which is representative of conditions in production of the article" (section 336-h-4), and after all of these facts have been determined from its "investigation" the commission is required (section 336-a) to "report to the President the results of the investigation and its findings with respect to such differences in cost of production," and to specify such increase, decrease or

change in basis of value as it finds shown by the investigation to be necessary to equalize such differences.

Upon receiving this report the President is directed (section 336-c) to:

> Approve the rates of duty and changes in classification and in basis of value specified in . . . (the report), if in his judgment such rates of duty and changes are shown *by such investigation of the commission* to be necessary to equalize such differences in cost of production.

Therefore, under the present law the commission, rather than the President, determines the facts and specifies the necessary changes. However, according to *Feltex Corp. v. Dutchess Hat Works*, 21 CCPA 463, 476, he "is not in any way bound by the 'results' or 'findings' reported by the Tariff Commission," and is merely:

> Required to approve the rates specified by it, if in his judgment such rates are "shown by such *investigation*" to be necessary to equalize such differences in cost of production.

Also (p. 476):

> The President, in forming his judgment, is confined to a consideration *of the facts* secured by the Tariff Commission in its investigation, and is further limited to approval of the rates specified by the commission if he finds, *from such investigation*, that the rates so specified are necessary to equalize cost of production.

Also, as was said in *Moss v. United States*, supra, p. 385, in respect to the decision of this court in *Norwegian Nitrogen Products v. United States*, supra:

> The case arose under the flexible provisions of the 1922 act; and much was said in the course of the opinion that has no application to the proceedings under the 1930 act, which, as heretofore pointed out, limits the President in the exercise of his judgment to a

consideration of the facts developed before the commission in the course of its investigation.

Thus, the legislative policy of Congress has been clearly and definitely expressed, to wit, if the facts secured by the commission show that existing duties are insufficient to equalize differences in cost of production, the President shall proclaim the changes recommended by the commission. It is equally clear that the conclusions of the President and the commission must be based on facts, so far as they can be obtained, and that the discretion of neither of these two agents of Congress can be substituted for the prescribed formula.

In accordance with this change of law it is an importer's right to ask the court, in proceedings properly brought, to examine facts established "by proper, material, and competent evidence" (*Foster* case, supra, p. 25), for the purpose of determining: a) Whether the commission complied with the terms of section 336, and (b) whether "there were no facts ascertained by the commission in its investigation that would warrant the presidential proclamation here involved" (*Fèlter* case, supra, p. 477).

VIII) **Related statutes**: Reference has been made herein to "foreign value," "American selling price," and "conversion of currency." These terms are defined or explained in sections 402 (*d*), 402 (g), and 522, of the tariff act of 1930, as set forth in the appendix hereto (pp. v, vi, viii). Briefly stated, "foreign value" is the market value or price *at the time of exportation to the United States* at which merchandise is sold or freely offered for sale, and it is this value which the commission found was being used at the time of the investigation (R. 16, par. 11). "American selling price" differs from foreign value in that it is the price at which an American article is being sold or offered for sale in the principal markets of the United States *at the time of exportation of the imported*

article. It is this value which the President directed should be used here.

Conversion of foreign currency for the purpose of the assessment and collection of duties upon merchandise imported into the United States is controlled by section 522, which directs that such conversion shall be made at the values proclaimed by the Secretary of the Treasury "for the quarter in which the merchandise was exported."

Section 522 indicates a Congressional intention to require a uniform basis for conversion of currency in all matters pertaining to customs duties. Therefore if section 336 is at all ambiguous recourse may be had to the wording of related sections of the same act to determine the intent of Congress. *Norwegian Nitrogen Products Co. v. United States*, 288 US 294, 315-6.

In addition to its effect in determinfng "cost of production," a reference to section 522 is *required* in order for the commission and the President to ascertain other facts specified by section 336. The statute states that, "if the commission finds it shown by the investigation that the *duties expressly fixed by statute* do not equalize the differences in cost of production, . . . the commission shall specify in its report such increases and decreases in *rates of duty expressly fixed by statute*," etc.

Obviously this language contemplates that the commission shall determine the *amount* of duties "expressly fixed by statute" by reference, in the case of merchandise subject to ad valorem duties, (1) to the proper dutiable value, and (2) to the proper rate of duty. The amount thus ascertained should then be compared with the differences in production costs.

Here the commission found that the rate of duty was 35 percent ad valorem, and that "foreign value" was the dutiable value (R. 16, par. 11). Therefore, a reference to section 402 (c) was essential in order to determine the

meaning of "foreign value," and such reference shows that foreign value is the value *"at the time of exportation to the United States."* Consequently, as these values were expressed in yen and not in dollars (R. 16), use of the proclaimed value referred to in section 522 "for the quarter in which the merchandise was exported" was required. This the commission failed to do, for it is stated in the report that (R. 16):

> The dutiable value of the Japanese product during 1931 and 1932, *converted to dollars at the average rate of exchange for the year 1932*, was $1.71 per case for the 10-ounce tins and $2.252 per case for the 15-ounce tins.

In making its investigation and in determining the all-important point of whether the statutory duty of 35 per cent, if applied to this dutiable value, equalized the difference in cost of production, the commission ascertained the duty by converting the yen at the arbitrarily selected rate of .2811 (table 13, R. 30; also R. 16). In this single particular, if in no other, the commission did not comply with the law.

Section 336 (b) directs the commission in certain cases to find a rate of duty, based upon the American selling price as defined in section 402 (g), sufficient to equalize differences in costs of production. In the present case the commission proceeded under this subsection, and found the American selling price of domestic clams (table 13, R. 30) as of September, 1931 and 1932 (table 9, R. 26). These dates were within the selected representative period. The commission then found that a rate of duty of 35 percent (based upon the American selling price) was necessary to equalize the difference in cost of production. However, the foreign cost of production was taken from values found for a different period; namely, the 22 months from December 1, 1930 to September 30, 1932, converted

at the average *1932* figures. Consequently the two facts, amount of duty and cost differential, were not compared as of the "representative period." Here again the commission did not comply with the law, for as said in the *Feltex* case, supra, 21 CCPA 476, 478:

> It is clear that Congress, in using the term "representative period," had in mind that conditions upon a given day or during a given month might not fairly reflect the prices at which the merchandise was imported into the United States, but in order fairly to determine invoice prices as evidence of costs of production, they should be considered over a representative period, and their weighted average *over such period* might be accepted.

Reference to other portions of the tariff act of 1930 aids in determining the questions here presented. Section 336 (e) (2) authorizes the commission to accept the weighted average of "the invoice *prices* or *values*" as evidence of cost of production. Section 402 (a) (appendix, p. v) states that "*for the purposes of this Act*, the *value* of imported merchandise shall be . . . (1) the foreign value or export value, whichever is the higher," and as provided for in sections 402 (c) and (d) "foreign" and "export" values are determined as of dates of exportation. By this definition Congress specified the value it authorized the commission to use.

Other portions of the tariff are also of utility in construing section 336 (e) (2). Section 481 (appendix, p. vi) directs that (a) "all invoices of merchandise imported into the United States shall set forth . . . (5) the purchase price of each item in the currency of the purchase, . . ." or "(6) . . . the price in such currency that the manufacturer, . . . would have received or was willing to receive, for such merchandise." By section 484 (b), (appendix, p. vii) an importer is required to file with the collector a certified invoice and declare under

oath (section 485-a, appendix, p. vii) that (section 485 (a) (2)) the prices set forth in the invoice are true. Therefore by virtue of these statutory definitions and directions it is clear that the "invoice prices or values" referred to in section 336 (e) (2) are the prices or values at the time of exportation. Consequently the commission did not ascertain the weighted average of such prices or values for a representative period, when it selected a rate of exchange other than those in effect upon the dates of exportation.

IX) **Prerequisites of a valid investigation**: As already observed, section 336 requires the commission to hold hearings and to give notice thereof to interested parties, and as held in the *Zeiss* case, supra, 23 CCPA, performance of these external acts is a condition precedent to legal procedure. But these are not the sole requirements. The commission is also charged with determining whether "duties expressly fixed by statute" equalize differences in cost of production.

This requires the commission to determine the amount of such duties by ascertaining dutiable value as *fixed by statute*, and applying thereto the tariff rate applicable to the merchandise under investigation.

Also, in order that the statutory comparison may be made with the difference in costs of production, the commission must first ascertain those costs.

If the commission finds, as in this instance, that the difference can not be equalized by a change in rate of duty, then under subsection (b) it must find the ad valorem rate "based upon the American selling price (*as defined in section 402-g*) of the domestic article" necessary to equalize such differences. Then the commission makes a second comparison, this time between (1) the amount of duty based upon American selling price and (2) the difference in production costs.

In each of the various processes above mentioned, the commission is controlled by statute. In order to find the amount of "duties expressly fixed by statute" the commission must turn to sections 402 and 522 for the purpose of determining (1) the dutiable value as expressed in foreign currency, and (2) the dutiable value as expressed in dollars; for it is impossible, under the circumstances of this case, to ascertain an *amount* of duty without first converting foreign value into American money and applying the statutory rate of duty.

To determine the difference in productions costs the commission must proceed in accordance with subsection 336 (b) or 336 (e), and is not authorized to substitute its discretion for the procedure therein set forth.

As to the third requirement (resort to American selling price) the commission must find this price "as defined in section 402 (g)." Consequently the price must be taken as of the "time of exportation of the imported article." Therefore Congress has clearly indicated that foreign invoice prices should also be taken as of the dates of exportation.

Not only is this the rule of reason, but the rule imposed by section 402 in the provision in subsection (a) that "*for the purposes of this Act* the value of imported merchandise shall be (1) the foreign value or the export value." This is supplemented (i) by the provision in subsections (c) and (d) that foreign value and export value shall be found as of "the *time of exportation* of such merchandise to the United States," and (ii) by the provision in subsection 402 (g) that the American selling price of any article produced in the United States shall be found as of "the *time of exportation* of the (competitive) imported article."

X) **Averages for representative period, and false currency conversion**: The commission found, and so reported to the President (R. 15, par. 9):

> The cost of production, as defined in section 336 (h) (5), was not readily ascertainable for the principal competing country, and the commission, in accordance with section 336 (c) (2) (A), accepted as evidence thereof the weighted average invoice prices of imports from that country.

In view of the fact that actual cost of production could not be ascertained, the commission's use of invoice prices was authorized, and it is only by examining the report and noting the method used in arriving at the "weighted average" that the illegality of the commission's acts becomes apparent. In this respect it should be noted that the selected "representative period" for the foreign article was from December 1, 1930, to September 30, 1932. The method was as follows (R. 14, par. 6):

> 6. *The years 1931 and 1932 are representative with respect to the* domestic cost of production of canned clams and the *invoice prices of Japanese clams, in terms of Japanese currency.* During most of the year 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. *For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative* of the present or *probable future* invoice values in terms of dollars. The commission has, therefore, used, for *comparison with the domestic costs*, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, *converted to dollars at the average rate of exchange for 1932.*

Respondent contends that the commission's method of converting foreign currency into dollars, as thus stated, is not in accordance with the statute. It will be noted that

the commission converted the yen into dollars on the basis of the average rate of exchange for 1932, instead of the rate actually prevailing at dates of invoices used. The provision for "the weighted average of the invoice prices or values for a representative period," of course means actual, and not speculative or arbitrarily imputed, "prices or values." In its discretion the commission may determine (a) what is a "representative period" (*Feltex* case, supra, 21 CCPA 476, 479, and (b) how values shall be "weighted." However, as said in the *Feltex* case, p. 478, "cost of production as defined in section 336 (h) includes the *various factors therein specified* 'for a period which is representative of conditions in production of the article.'" Consequently all of the factors must be determined as of this representative period.

In accordance with this rule the commission may not juggle with prices and values by taking those of April 1, 1931, for instance, when the yen had a proclamed value of 49.85 cents and an exchange value of 49.354 cents (Treasury Decisions 44737, 44752), and convert them into American dollars "at the average rate of exchange for 1932," during which time the exchange rate was as low as 20 cents (Treasury Decision 46013, for November 30, 1932), and for many months was off from about 40 to nearly 60 percent. Note the commission's computation of the "average" for 1931 and 1932, as being 48.85 and 28.11 cents respectively (table 14, R. 30).

There is no logical or plausible reason why, in finding cost of production, the commission should convert "to dollars at the average rate of exchange for 1932," any more than at the average rate for the entire period of 22 months (December 1, 1930, to September 30, 1932), or for the final three months, or the initial six months, or for any other partial period.

Suppose that these clams, as often happens with other commodities, had been invoiced in United States currency (See Tariff Commission report 107, Frozen Swordfish, p. 62 of this brief). There would have been the same disparity between dollar values of 1931 and the dollar values of 1932 as that found by the commission in yen values for the same years. Under such circumstances it is not to be believed that the commission would have taken an analogous step and stated the value of the dollars as different from its actual value.

The illegality of the procedure followed by the commission arises out of the fact that by use of this false value the commission did not ascertain "the weighted average of the invoice prices or values for a representative period," as required by section 336. Neither did the commission ascertain the true differences in cost of production. Consequently an essential part of the required investigation was omitted. Also the change recommended to the President was not based upon data obtained in accordance with the statute.

While the commission in its discretion probably may decide what is a representative period, the date for that period must be historically correct. It is an obvious and amazing abuse of discretion for the commission to impute a value of .2811 to the yen for a long period during many months of which it was in fact .4985, and for which period, except the single month of September, 1932, no invoices were used where the exchange rate was lower than .3216 (table 11, R. 28; table 14, R. 30). If the truth may be thus ignored, the commission may with equal propriety disregard other crucial facts, such as quality of merchandise, its identity, or its domestic value, or transportation costs. Once started on this illegal course, there is no logical stopping place, and the commission becomes the sole arbiter of rates of duty.

In reference to this procedure the court below, in an able opinion by Judge Hatfield, held (R. 66-7) that:

> Obviously, the commission did not find the weighted average of the invoice prices for a representative period. On the contrary, it found a weighted average by using two separate periods, neither of which was representative. The formula used by the commission was not that prescribed by the Congress, but one which the commission evidently thought was better adapted to the exigencies of this particular case.

The court also outlined the effect of the procedure as follows (R. 67-8, emphasis added):

> By following its own formula, the commission found it impossible to equalize the difference in costs of production of the foreign and domestic articles by raising the 35 per centum ad valorem rate of duty provided in paragraph 721 (b), supra, 50 per centum, the maximum increase provided in section 336 (a), supra, and, accordingly, found it necessary to apply the 35 percentum ad valorem rate of duty "based upon the American selling price (as defined in section 402-g) of the domestic article," in accordance with the provisions of section 336 (b), supra. Had the commission followed the second formula hereinbefore stated, the difference in cost of production of the foreign article and the domestic article would have been much less, and consequently the customs duties necessary to equalize such differences would have been much less. Or had the commission followed the formula prescribed by the Congress, the difference in cost of production of the foreign and domestic articles would have been less than that found by the commission and greater than that which it might have found had it followed the second formula, and consequently the customs duties necessary to equalize such difference in cost of production would have been less than that found by the commission in the instant case, and greater than that which the commission would have found had it followed the second formula.

> *It is clear, therefore, that if the commission has authority to do what it did in the instant case, it has authority to find on the same facts at least three entirely different costs of production for the foreign article, and, instead of recommending to the President a rate of duty based upon findings of fact, could recommend a rate of duty in accordance with its own economic theories.* Such authority necessarily involves a discretion as to whether tariff duties shall be high or low, or whether they shall be high in certain instance and low in others; a discretion, legislative in character, which the Congress had no power to delegate. *Hampton & Co. v. United States*, 276 US 394, and cases therein cited. Obviously, the Congress did not intend to delegate any such power to either the Tariff Commission or the President.
>
> The Congress has given the Tariff Commission wide latitude, so that the difference in cost of production of a domestic and a like or similar foreign article might be properly ascertained. In so doing, however, the Congress has prescribed certain limitations and laid down certain definitions, which the Tariff Commission has no right to ignore. *Hampton & Co. v. United States*, supra.

The foregoing argument and the quoted portion of the court's decision were based upon the statement made by the commission (R. 27) that they had:

> Analyzed records of imports at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

Also, that (R. 29):

> The Japanese costs (as evidenced by invoice prices), and the dutiable values, have been converted from yen to dollars at the average rate of exchange for the year 1932, namely, $0.2811.

However, a reference to table 11 (R. 28), shows that "negligible imports" were made from April to August, inclusive, 1932. Therefore those from December 1930 to March 1932, and those in September 1932, were virtually the only ones actually considered. The fact that prices were taken for only 4 months of 1932 illustrates with greater force the unfairness of applying the average rate of exchange for the entire year. For three of these four months the average rate of exchange was .3415, and for all of them .3208. Also, as shown by table 14 (R. 30) the average rate for *the 8 months* during which the commission actually obtained prices was approximately .4814!

If the law permitted the commission to use any other rates of exchange than those in effect at the times of exportation, it would seem clear that the direction to the commission to accept "the weighted average of the invoice prices" (sec. 336 (e) (2)) could mean only that the average rate of exchange in effect while the merchandise was exported could be applied, and as shown above, this average was .4814, a rate 79 percent higher than the rate used. In view of the careful and particular manner with which the commission's duties are outlined, it hardly seems possible that Congress intended that the commission should adopt whatever rate of exchange it chose and by such means circumvent the manifest purpose of having duties adjusted on a scientific and fairly accurate basis.

XI) **Method used in computing cost of production:** Petitioner asserts (p. 17 of brief) that "it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the commission's recommendation upon his own conclusion drawn from the facts set forth in the commission's report."

In one respect this would be immaterial, for a legal investigation is necessary, and if these acts were contrary

to law the commission's investigation was not legal. Consequently the proclamation would be void. However, as is shown below, the report of the commission contains evidence sufficient to show that the President proceeded on the same erroneous basis.

Table 11 (R. 28) contains data sufficient to demonstrate that the conclusion of the President could not have been based upon the *facts* found by the commission, but must have been based upon use of the erroneous conversion factor.

Under section 336 (c) the ultimate conclusion which the President must make is whether the change specified by the commission is "shown *by such investigation of the commission* to be necessary to equalize such differences in costs of production." The difference thus referred to is defined in subsection (a), in this language:

> . . . the duties expressly fixed by statute do not equalize the difference in the cost of production of the domestic article and the like or similar foreign article when produced in the principal competing country . . .

To arrive at this ultimate conclusion the President was first required to *find from the investigation* the differences in costs of production. After finding these differences the President then should determine whether the change specified by the commission was "shown by such investigation" to be necessary to equalize the difference.

If he found that the new rate or change in basis of value was necessary to equalize the costs of production, he was then required to "approve the rates of duty and changes . . . in basis of value specified in any report of the commission." However, before the President can legally, and not arbitrarily, approve the rate of duty or change in basis of value, he must, in his judgment, determine that "such rates of duty and changes *are shown by*

the investigation of the commission to be necessary to equalize such differences in costs of production." Therefore, an examination can be made of the facts which were before the President in order to determine whether, as stated in the *Feltex* case, supra, p. 477:

> The record discloses that there were no facts ascertained by the commission in its investigation that would warrant the presidential proclamation here involved.

Furthermore, if use by the commission of a rate of exchange other than the ones prevailing, during "the representative period" was contrary to the statute, then the President's actions may be examined in order to determine whether he also used this rate of exchange. This is similar in principle to the supposifitious case referred to in *United States v. Leon*, 20 CCPA 49, 53, as follows:

> If, in ascertaining the differences in costs of production, the President had been limited by statute to a consideration of certain facts, which did not include the transportation costs complained of, and if it had been legally established that the President had included such costs, it might well be argued that the law had not been complied with.

The *Leon* case related to an importation under the 1922 tariff. Under the 1930 tariff the President must base his conclusion upon the Tariff Commission's "investigation," and this of course means the facts ascertained by the investigation.

Let us now examine the information and facts which the President had before him. In table 11 (R. 28) dutiable value and packed value (as evidenced by invoice prices) are given for the two sizes of imported clams, in Japanese yen and in the dollar equivalent, both at the prevailing rates of exchange on dates of exportation, and also at the average rate for 1932. The figures are as follows:

Size	Dutiable value			Packed value		
	Yen	At prevailing rate	At average rate in 1932	Yen	At prevailing rate	At average rate in 1932
10-oz.	6.0688	$2.7175	$1.7060	5.6277	$2.5266	$1.5820
15-oz.	8.9760	4.3027	2.5233	8.5375	4.0858	2.4000

Basically, these two types of values were essential: "Dutiable" value must be used for ascertaining the amount of existing duties, and "packed" value was an element of production costs.

The values given above were the basic figures prepared by the commission from which the President was required to determine whether or not the existing duties equalized any difference in the cost of production.

In making its comparison the commission had used the dollar values which it obtained by converting the yen values as stated, at the *average* rate, as follows (table 13, R. 30):

	10 ounces	15-6 ounces
Domestic cost:		
At factory	$4.24	$5.84
Transportation and delivery	.26	.42
	$4.50	$6.26
Foreign cost:		
At factory (as evidenced by invoice values)	$1.58	$2.40
Transportation and delivery	.30	.37
	$1.88	$2.77
Excess of domestic cost	$2.62	$3.49

These figures show a difference in cost of production; and the following computation shows that the "duties expressly fixed by statute" (35 percent ad valorem) do not equalize this difference:

	10 ounces	15.6 ounces
Excess of domestic cost	$2.62	$3.49
35 percent of dutiable values, $1.706 and $2.5233, at *average* rate of exchange (table 11, R. 28)	.60	.88
Necessary to equalize, at average rate of exchange	$2.02	$2.61

In table 13 (R. 30) the American selling price for each size is given as $5.51 and $7.02 per case, respectively; and duty at 35 percent of this value, compared with the assumed differences in cost of production, is as follows:

	10 ounces	15.6 ounces
Domestic cost plus transportation	$4.50	$6.26
Foreign cost plus transportation	1.88	2.77
Difference (excess of domestic cost)	$2.62	$3.49
Specified duty of 35 percent on American selling price of $5.51 and $7.02	$1.93	$2.46

This was the method of comparison used by the commission, and, as will be demonstrated below, used by the President. However, a similar comparison, based upon use of the *prevailing* rate of exchange rather than an arbitrary *average* rate, shows that the changes "specified in any report of the commission" *were not* "necessary to equalize such differences in costs of production." This is why it is certain that the President used the same erroneous method as the commission.

The comparison is as follows: All values given below appear in tables 11 and 13 (R. 28, 30); and in each instance, except the transportation charges of the foreign article, the yen value of the foreign article has been converted at the prevailing rate of exchange on date of exportation. As the amount of the transportation charges, when converted from yen to dollars at the prevailing rate

of exchange, was not stated by the commission, the figures here given are those used by the commission. See "comparative costs" (R. 29; table 13, R. 30). This factor, however, is in petitioner's favor, as it shows a lower transportation cost.

COMPARATIVE COSTS

		10 ounces	15-6 ounces
Domestic (table 13):			
Cost plus transportation and other delivery charges		$4.50	$6.26
Foreign (table 11):			
Cost	*Transportation*		
2.5266	.30	2.83	
4.0858	.37		4.46
Difference in cost of production		$1.67	$1.80
"Duties expressly fixed by statute":			
35% of 2.7175 (dutiable value, table 11)		.95	
35% of 4.3027 (dutiable value, table 11)			1.51
Deficiency in duty necessary to equalize costs		$ .72	$ .29

"Had the commission proceeded on the above basis, it would likewise have found that the existing rate of duty did not equalize the differences in production costs, and therefore it would have been the commission's duty to:

> Specify in its report such increases or decreases in *rates* of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences.

The commission did not, however, proceed on this basis, but specified to the President a duty of 35 percent based upon the American selling price. With these facts before him, it became necessary under section 336 (c) for the President to:

> Approve the . . . changes in basis of value specified in (the) report of the commission . . . if in his judgment such . . . changes (were) *shown by such investigation* to be *necessary to equalize* such differences in costs of production.

The effect of the change actually specified by the commission, when compared with the *true* facts as to foreign, dutiable and packed values ascertained by use of *prevailing* exchange rates, was as follows:

	10 ounces	15-6 ounces
Difference in cost (see "comparative costs", above):	$1.67	$1.80
Duty of 35 percent of American selling price as specified by commission:		
10 ounces, 35 percent of 5.51:	$1.93	
15 ounces, 35 percent of 7.02:		$2.46
Excess over amount of duty necessary to equalize costs	$0.26	$0.66

These figures show that the President used the values based upon the average rate of exchange; for if this were not true, he could not have approved the change specified by the commission, because the law merely permitted him to proclaim such changes as are *necessary to equalize the differences in costs of production*. Approval of the recommended rate resulted, as is shown above, in assessment of duty in excess of that required to equalize the difference in production costs. Furthermore, the President exceeded his authority; for, from the information before him, he could not, except by use of foreign values converted at the average rate of exchange, have found that the recommended rate of duty was necessary.

Although the majority of the court below held that the proclamation was invalid because (R. 67-8) "a legal investigation by the Tariff Commission—a condition precedent to issuance of a lawful proclamation by the Presi-

dent—has not been made," one member of that court (Judge Lenroot) stated (R. 71):

> It is my judgment that if there was any substantial evidence before the commission to sustain the proclamation of the President, it was valid, notwithstanding any error made by the commission in drawing its conclusions from the facts secured by it in its investigation.

This point is answered by the record. As shown above, a duty of 35 percent ad valorem based on the American selling price of $5.51 and $7.02 per case (table 13, R. 30) was warranted only in the event the differences in costs of production were at least equal to the amount of such duty, namely $1.93 per case for the 10-ounce size and $2.46 per case for the 15-ounce size. As the cost of producing the domestic article, plus transportation charges, was $4.50 and $6.26 per case for each of these sizes (table 13, R. 30), it would be necessary to find a foreign cost of production, including transportation charges, of $2.57 and $3.80 per case for each type to justify the recommended duty. As shown by the report, the transportation charges, even when converted at the low rate of exchange of .2811 (R. 29, and table 20, R. 36), were 30 cents per case for the 10-ounce size and 36.53 cents per case for the 15-ounce size. Therefore to justify the recommended amount of duty, namely, $1.93 and $2.46 per case, the President would have been required to base his approval upon an existing foreign cost of production not in excess of $2.27 for the 10-ounce size and $3.43 for the larger size.

As shown by table 11 (R. 28), the weighted averages of the invoice prices at *prevailing* rates of exchange were $2.52 and $4.08 respectively. Therefore there was no "substantial evidence before the commission to sustain the proclamation." In addition, table 11 shows that during the entire "representative period" the value of the 10-ounce size, when converted at prevailing rates of ex-

change, was higher than $2.27 per case except in January, February, March, and September, 1932, and the 15-ounce size exceeded $3.43 per case in each month except February, 1932. Inasmuch as the law does not permit the President to select the "representative period," it cannot be assumed that he might have based his conclusion upon the values existing during these few months.

Judge Lenroot also stated (R. 71):

> There is nothing in the report of the commission or in the record indicating that it did not also have before it invoice prices of imports from Japan, in terms of yen, for the year 1933 and immediately preceding the date of its report, which was April 5, 1934.

On this point the commission's report, which petitioner states (p. 12) is "a *complete* summary of the information obtained in its investigation," is self-explanatory, for it states (R. 27):

> The commission analyzed records of imports entered at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

In view of this specific statement as to the scope of the inquiry, it hardly seems plausible to assume that the commission might also have obtained such data for another period.

However, there is this additional reason why such an assumption should not be made: Section 336 charges the commission with the duty of determining a period of time representative of costs of production, and here the commission selected the years 1931 and 1932 for that purpose (R. 14). Therefore it cannot properly be assumed that the President might have had similar data before him relating to cost of production (as represented by invoice prices)

for a different period of time; namely, 1933 and up to April 1934.

Under section 336 (e) the ascertainment of cost of production is committed to the commission, and Congress required that certain definite facts be taken into consideration. They include, among others, "for a period which is representative of conditions in the production of the article," the cost of materials, labor, general expenses, etc. Therefore there can be no legal basis for an assumption that the President might have had such data for another period of time. If this were so, it follows that the President and not the commission selected a "representative period" for the foreign article, and compared it with the costs of the domestic article existing in a different representative period. Such a procedure would clearly be contrary to the statute.

XII) **Other relevant factors**: Although the commission specifically found that "no other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation" (R. 5), still the theory is advanced by counsel for petitioner (p. 26), as it was in the court below, that use of a false rate of exchange is permissible under section 336 (e) (2) (C), which allows the commission to take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." Such an argument is fallacious; for, after having ascertained the foreign costs in accordance with the statute, if the commission found that the duty expressly fixed by statute *did* equalize differences in costs of production, then they might, in their own discretion, and under the guise of "other relevant factors," use an improper rate of exchange, to alter these values in any manner they saw fit. Certainly the use of an *erroneous* exchange rate is not a "relevant factor" referred to in the section.

Also, as was pointed out by the court below (R. 84):

> The Congress certainly did not intend that, in finding the "weighted average of the invoice prices or values" of a foreign article "for a representative period," the commission should take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." It is obvious that Congress intended that such relevant factors, if any, should be considered by the commission independently of, or supplementary to, the weighted average of the invoice prices or values of a foreign article for a representative period.

This conclusion is manifestly sound. Section 336 (e) directs the commission to take into consideration "in ascertaining the *differences* in cost of production" the following facts:

1) As to the domestic article: (a) the cost of production as defined by the statute, (b) transportation costs, and (c) other relevant factors that constitute an advantage in competition.

2) As to the foreign article: (a) the cost of production as defined by the statute, or in lieu thereof the weighted average of the invoice prices for a representative period, (b) transportation costs, and (c) other relevant factors that constitute an advantage or disadvantage in competition.

From the very arrangement of this law it is apparent that "*other* relevant factors" may be considered "in ascertaining the *differences* in costs of production," but not considered when ascertaining the foreign cost of production as represented by invoice prices for a representative period.

XIII) **Legislative history**: It is asserted by petitioner (p. 20) that the legislative history of section 336 "shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating

the need for a flexible tariff"; also, that when the tariff act of 1922 was being considered (p. 21):

> The Senate Finance Committee reported that the American valuation plan was impracticable of administration and recommended in lieu thereof a flexible-tariff provision to accomplish the same result. S. Rept. 595, 67th Cong., 2d sess., pp. 3, 6-7; see also 62 Cong. Rec. 11186, 11189.

In Senate report 591 it was said on this subject (p. 3):

> Following this suggestion (of the President) the committee proposes amendments to the House bill which will authorize the President——
>
> a) To modify rates either upward or downward, within prescribed limits *and in accordance with definite rules laid down by Congress* so that the rates may at all times conform to existing conditions.

One of the rules subsequently adopted and carried forward into the tariff act of 1930, which petitioner seeks now to avoid, is that changes in duty shall be based on differences in *costs of production* for "a representative period."

Petitioner also argues (p. 24) that under respondent's contention a foreign article "would enjoy *an advantage in competition with the* domestic article" which the commission and President would be powerless to prevent. This statement necessarily assumes that the law directs the commission and the President to act in order to offset every "advantage in competition with the domestic article." The conclusion is erroneous, for the purpose of the law is to equalize differences in "costs of production."

62 Cong. Rec. 11186, 11189, cited by petitioner (p. 21), relates to discussion in the Senate on the then proposed section 315, tariff act of 1922, which at that time read in part as follows (p. 11162):

> Sec. 315 (a). That in order to regulate foreign commerce of the United States and put into effect the policy of Congress intended, whenever the President, upon investigation of the *difference in conditions of competition in trade in the markets of the United States* . . . shall find it thereby shown that the duties fixed in this act do not equalize *said differences in conditions of competition.* . . .

This "yardstick," namely, "differences in conditions of competition," is practically the same as petitioner now contends for. However, Congress refused to adopt it; for, as shown on page 11189, Senator Lenroot proposed that this phrase be changed to differences in "cost of production," because, as he said:

> The determination of differences in cost of production clearly involves the ascertainment of facts, and in the ascertainment of those facts whoever does investigate the subject must take into consideration the same factors.

An amendment to this effect was offered (p. 11197), and the change was subsequently made.

The same requirement exists in the present tariff; that is, a change in duty can be made only when warranted by the *fact* that a difference exists in costs of production. Therefore it follows that such facts may not be distorted by use of an exchange rate in order to secure what petitioner describes as an equalization of advantages in competition.

A statement by Senator Walsh, pertinent to petitioner's argument, is found in 72 Cong. Rec. 11185, as follows:

> No answer whatever thus far, so far as I have been able to discover, has been made to the contention which I advanced, that the power thus delegated, in order to be constitutional, must be subject to review by the courts *in order to determine whether the statute was actually followed or was not followed by the*

legislative officer to whom the power had been delegated.

This is all that respondent asks, namely, a court review to determine whether the statute was actually followed.

The above Congressional history relates to the tariff act of 1922, but subsequent Congressional action even more pertinent is as follows:

As appears in volume XVII, p. 10657, of the report of hearings before the Committee on Ways & Means, 90th Congress, on "Tariff Readjustment, 1929", the Tariff Commission had been asked to submit a statement of the difficulties found in the administration of section 315, tariff act of 1922, and suggestions for remedying the same. In compliance with this request the commission reported on March 30, 1929, under the heading "miscellaneous cost problems" (p. 10660), as follows:

> (c) *Depreciated exchange.* In some countries where the value of money has depreciated in terms of gold it is almost impossible to obtain costs of production which will be representative of *competitive conditions* over a considerable period. This difficulty is diminishing as European currencies are becoming stabilized, but in some countries the variations in the purchasing power of local currency from month to month are still a bar to obtaining reliable cost of production data.

After listing the difficulties, many of which pertained to ascertainment of cost of production, the commission stated (p. 10662):

> 1) Changes in tariff rates should be based upon *differences in competitive conditions* in the United States and the principal competing country or countries. In determining *competitive conditions* the President, insofar as he finds it practicable, should take into consideration the following factors:
>
> a) Cost of production for similar competing articles. . . .
>
> . . . . . .

d) The invoice price of imported articles which compete with similar products produced in the United States. . . .

h) Unstable currencies. . . .

k) Advantages granted to a foreign producer by a foreign government or by a person, partnership, corporation, or association in a foreign country. . . .

m) Any other advantage or disadvantage in competition.

A proposed amendment to section 315 was also submitted (p. 10662), and it was therein provided that changes should depend upon "the *differences in conditions of competition in the principal market or markets of the United States,*" of the domestic and the foreign article.

On May 12, 1929, HR 2667 was introduced, providing, as suggested by the Tariff Commission, that changes in duties should be based on "differences in conditions of competition in the principal markets of the United States." House report 7, 71st Cong., 1st sess., p. 160.

Despite this recommendation, which as shown above was similar to the one rejected in 1922, Congress readopted in section 336 the controlling factor of section 315, namely, "*differences in costs of production.*"

In view of the commission's statement that depreciated exchange made it difficult to ascertain "costs of production which will be representative of *competitive conditions* over a considerable period," it is significant that Congress did not adopt as a criterion the "differences in conditions of competition," but retained the former basis, namely, "differences in costs of production." It is also significant that the following portions of section 315 were not materially changed, but merely rearranged in section 336:

Sec. 315 (c). That in ascertaining the differences in costs of production . . . the President, insofar

as he finds it practicable, shall take into consideration . . . (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Sec. 336 (e). In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable: . . . (2) (c) other relevant factors that constitute an advantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

Thus it may be seen that Congress did not give the President, as recommended by the commission (p. 10662), "a broader base for determining changes in rates of duty than is given by the present law," and specifically refused to adopt as a base the "differences in competitive conditions." Therefore, the test provided by Congress, namely, "the differences in cost of production," is controlling, and the commission may not substitute its own economic theories as to "the present or probable future invoice values in terms of dollars" (R. 24) for this test. This would be an adoption of the principle of "differences in competitive conditions," which Congress rejected.

In *Norwegian Nitrogen Products Co. v. United States*, 288 US 294, 314-5, this court, in construing section 315, tariff act of 1922, gave consideration to the fact that the work of the Tariff Commission was continued by section 336 of the act of 1930. In the present case, Congressional action in another matter is of interest.

On January 26, 1933, the Committee on Ways & Means, 72d Congress, 2d session, held hearings on HR 13999, introduced by Mr. Hill. The report of these hearings is entitled "Equalization of tariff duties by compensation for depreciation of foreign currency," and as shown by

the report (pp. 1-2) the bill provided for a compensating tax based upon the amount of depreciation of foreign currency.

Mr. John R. Hopkins, special assistant to the Secretary of the Treasury, appeared before the committee and opposed enactment of the bill. He also recommended that other legislation be adopted (p. 7) which would permit the Tariff Commission to conduct investigations of foreign and domestic articles and (p. 8) to report to the President its recommendations for changes in duty *to offset depreciated foreign currency*. Following his statement of the proposed legislation, the report reads in part as follows (pp. 9-10):

> Mr. Hill: It is rather difficult to follow, of course, the statement as complex as the one you have made this morning and retain all the points you have brought out. But as I get it, such a plan as you suggest would mean delegating to the Tariff Commission much larger duties than that commission now exercises, and giving the commission, together with the President, a great deal more authority and power in the matter of adjusting tariffs on a flexible basis. That is briefly the effect of your suggested plan, is it not?
>
> Mr. Hopkins: Yes, it will throw, of course, additional duties on the Tariff Commission.
>
> Mr. Hill: It practically delegates the whole power of levying tariffs and compensating duties to the Tariff Commission and the President?
>
> Mr. Hopkins: It sets forth a rule under which they must operate in determining the duty necessary to compensate. . . .
>
> Mr. Hopkins: Many of the investigations the commission is carrying on at the present time *under section 336* of the tariff act are really made necessary through depreciated currencies. I do not know what their number is, but I dare say quite a substantial portion of their investigations are really under sec-

tion 336 on depreciated currencies, *without the possibility, under section 336, to adequately correct the present situation.*

This additional power to the Tariff Commission and the President, which would have had the effect of permitting changes in duties because of depreciated currency, has not been granted by Congress. Despite this, the commission in the instant case adopted the principle of this proposed, but rejected, legislation, and based its recommendation to the President not on the difference in costs of production, as required by section 336, but on its attempted adjustment of such cost through use of erroneous exchange rates.

During this same session of Congress five other bills were introduced, whose purpose was, by one method or another, to adjust duties because of depreciated foreign currency. None of them was enacted. See Cong. Rec., 72d Cong., 2 sess., p. 718, HR 13790; p. 2555, HR 14413, 14428; and p. 2640, HR 14435.

Also, during the first session of this Congress 15 bills "to equalize tariff duties by compensation for depreciation in foreign currencies" were introduced but never enacted: HR 8544-7, 8550-7, Cong. Rec. 2930; 8640, Cong. Rec. 2971; 8688, Cong. Rec. 3156, and 8752, Cong. Rec. 3293.

Notwithstanding the failure of these repeated efforts to implement the Tariff Commission with a new yardstick the action of the commission here was a frank attempt to proceed without such an aid, and to adjust duties upon the basis of depreciated currency, contrary to the method specified in section 336.

XIV) **Effect of petitioner's contention on validity of section 336**: The action of the President and the commission in changing rates of duty is in its nature legislative. Therefore, if this power has been constitutionally dele-

gated it must be presumed, as was said in *Cincinnati v. Clinton County,* 1 Ohio State 88, that section 336 does not delegate "power to make a law which necessarily involves a discretion as to what it shall be," but merely confers "authority as to its execution, to be exercised under and in pursuance of the law." This statement of principle was cited with approval in *Field v: Clark,* 143 US 649, 633; *Hampton v. United States,* 276 US 394, and *Panama Refining Co. v. Ryan,* 293 US 388. Also, the validity of section 336 must depend upon whether Congress stated its purpose and provided "the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits." *United States v. Rock Royal Co.,* 307 US 533, 574. To the same effect see also *Panama Refining Co. v. Ryan,* supra; *Mutual Film Corp. v. Industrial Commission,* 236 US 230; *Interstate Commerce Commission v. Goodrich Transit Co.,* 224 US 194, 214, and *Field v. Clark,* supra.

As to the limitations on such standards when laid down by the legislature, it was said in *St. Louis Merchants Bridge Terminal Railway Co. v. United States,* 188 F. 191, 195, that the legislature "cannot delegate its legislative power, *its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law.*"

This principle is also concisely stated in editorial annotations to *Panama Refining Co. v. Ryan,* supra, 79 L. ed. 488, as follows:

> If, by the terms of an act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power, and the act is void. Such a determination of legislative expediency can be made by the legislature alone.
>
> "An act of legislature which vests in such officers the discretion to determine what the law is, or to

apply it to one and refuse its application to another in like circumstances, is void as an unwarranted delegation of legislative authority."

Concededly, by section 336 Congress stated its purpose, namely, that duties should be adjusted either upward or downward so as "to put into effect the policy of this Act, intended" (section 336-a) which is (preamble, tariff act of 1930) "to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

As to the required "standards" Congress clearly stated in section 336 that the changes in rates of duty should be made in accordance with *the differences in costs of production* so as to equalize these differences.

Clearly the power to change a rate of duty in accordance with such a policy may be properly delegated. However, it is also true that the legality of the delegation depends upon whether sufficient "standards," are set forth, or as was said in *Hampton v. United States*, supra, an "intelligible principle" is prescribed.

Under petitioner's theories here, no such standard or principle exists, for in effect it is claimed that the commission is privileged to use any rate of exchange it wishes in ascertaining the "differences in cost of production." Such power necessarily carries with it the discretion to determine whether in any given case duties shall be raised or lowered, or greatly increased or slightly increased, or lowered to a large extent or to a small extent, for if unrestricted discretion may be exercised by the commission in selection of a rate of exchange to be used in converting foreign currency, then by such selection the commission may obtain a wide range of assumed foreign costs of production, and of course obtain corresponding differences in

the cost of producing the foreign and the domestic articles.

Such a privilege corresponds to that held by the President under the National Industrial Recovery act, as to which it was said in *Panama Refining Co. v. Ryan*, supra, (p. 415):

> It (section 9-c of the National Industrial Recovery act) establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, *it gives to the President an unlimited authority to determine the policy and lay down the prohibition, or not to lay it down, as he may see fit.* . . .

Also, in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 US 48, this court said (p. 59):

> In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its actions.

If the petitioner's argument is accepted, it follows that the commission or the President has the power under section 336 "to determine what the law is, or to apply it to one and refuse its application to another in like circumstances." If this is true, section 336 is an unconstitutional delegation of legislative power because "Congress failed to set up a standard for the President's action." *Panama Refining Co. v. Ryan*, supra, p. 415.

As opposed to this respondent contends that the commission should base its findings as to differences in costs

of production upon the actual foreign costs on the dates of exportation as evidenced by invoice prices or values. Under this construction, foreign cost may be ascertained in a definite manner, and section 336 becomes a valid delegation of legislative power. Therefore the decision of the court below should either be affirmed on the grounds stated therein or the proclamation held to be invalid because based upon an unconstitutional statute.

XV) **Other points in petitioner's brief:** Petitioner states (p. 2) that the first question is whether the Customs Court has power to review the *facts and reasoning* upon which the Tariff Commission based its recommendation to the President, and if *dissatisfied* to declare the proclamation void. If this were the real issue the decision below should probably be reversed, but it is not. A study of the decision of the lower court and of the facts revealed by this record clearly shows that the court did not attempt to substitute its judgment for that of the commission, and at no time has respondent contended that this should be done.

With this question as its premise petitioner argues (p. 8) that the court below "had no power to review the facts upon which the Tariff Commission based its recommendation to the President, or to declare the proclamation void because it believed that the commission had erroneously interpreted the tariff act in ascertaining the foreign cost of production." In support of this petitioner asserts (p. 14) that the prescribed forms of legislation were regularly observed because the preliminary external requirements of notice, hearing and report to the President were complied with. In other words, it is petitioner's position (p. 14) that so long as the commission ostensibly follows section 336 "there can be no judicial review." Such an argument is specious, for it ignores the fact that no law can be changed by an agent of the legislature unless the

prescribed conditions are complied with. Here Congress prescribed that certain things should be done, among them being ascertainment of costs of production in a specific manner. Therefore compliance with such conditions is prerequisite to a valid investigation.

In support of its argument petitioner cites (p. 13): *United States v. Chemical Foundation*, 272 US 1, 14-15; *Dakota Central Tel. Co. v. South Dakota*, 250 US 163, 184; *Monongahela Bridge v. United States*, 216 US 177, 195; *The Philadelphia & Trenton R. R. Co. v. Stimson*, 14 Pet. 448, 458; *Martin v. Mott*, 12 Wheat. 19, 30, and *Sterling v. Constantin*, 287 US 378, 399, as holding:

> That where Congress has empowered a public officer to take some specified legislative action when, in his judgment, such action is necessary to carry out the policy of Congress, the judgment of the officer as to the existence of facts making the action necessary is not subject to judicial review.

Even assuming that the above statement is a correct interpretation of these decisions, the principle is not applicable, for here Congress did not pretend to delegate such power to the commission, but on the contrary prescribed with sufficient exactness the only *facts* which the commission might consider. Congress clearly did not empower the commission to take legislative action when *in its judgment* such action was necessary. Furthermore, neither did Congress empower the President to proclaim changes in duties "when, in his judgment, such action was necessary," but specifically limited him in the exercise of his judgment to the facts "shown by such investigation" of the commission. Therefore a judicial review is proper to determine whether those facts were the ones required by section 336 and whether they had been ascertained in the manner provided for.

The decisions referred to above are not quite as definite as petitioner suggests, in holding that no judicial review exists under such circumstances.

a) *United States v. Chemical Foundation*, supra, p. 14, is authority for the fact that, "in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties," and that "under this presumption it will be taken that Mr. Polk (the public officer) acted upon knowledge of the material facts," and "the validity of the reasons stated in the order, or the basis of fact on which they rest, will not be reviewed by the courts." In the present case respondent has provided "clear evidence to the contrary." Therefore the decision is not applicable.

b) The second case, *Dakota Cent. Telephone Co. v. South Dakota*, supra, p. 184, related to actions taken by the President which were authorized by joint resolution of Congress during war, and it was there held that no judicial review existed to correct alleged mistakes or wrongs arising from asserted abuse of discretion. This decision is of no interest here.

c) The general rule stated in the *Monongahela Bridge Co.* case, supra, is likewise inapplicable, for it was there said (p. 194) that it did "not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, *or that he pursued any method not contemplated by Congress.*" Here this is the very point involved; therefore the following language from the *Monongahela* case is applicable (p. 194):

> Except that when it (Congress) provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress.

d) The *Philadelphia & Trenton R. R. Co.* case, supra, was an action for violation of a patent, and merely holds (p. 458) that public officers are presumed to have performed their proper official duties, *until the contrary is proved*, and that where a patent has been granted it is prima-facie evidence that the proofs were regularly made and were satisfactory, and that no tribunal is at liberty to reexamine or controvert the sufficiency of such proof. The contrary is proved here.

e) *Martin v. Mott*, supra, related to an act of Congress authorizing the President to call forth the militia, and held that this power was exclusively vested in him and that his decision was conclusive. In rendering this decision the court stated (p. 30):

> Whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

Section 335 does not grant such discretionary power.

f) The remaining decision, *Sterling v. Constantin*, related to the exercise by a state governor of discretion in determining whether an exigency requiring military aid had arisen, and it was there held that the executive's decision was conclusive.

At page 15 it is argued that the court below failed to observe the distinction between administrative orders directed against particular persons, which are subject to impeachment if they are without evidence to support them, and legislative action taken by a public officer pursuant to authority delegated to him, which is not subject to impeachment if the prescribed forms of legislation have been observed. This assumes that the court below based its decision upon a finding that there was no evidence to

support the proclamation, but such is not the case. The court found that ascertainment of cost of production for the selected *representative period* was one of the "prescribed forms" and that, as the commission had not ascertained this fact, the proclamation was void.

Although it is repetitious to so state, this again illustrates the conflicting contentions here. Petitioner's argument is based upon the assumption that so long as the commission gave notice, held hearings, and reported to the President, no inquiry may be had as to whether the formula prescribed by section 336 was followed. As opposed to this, respondent contends that the court may determine whether costs of production and duties necessary to equalize any differences in costs were ascertained in the manner provided for by statute.

Petitioner also cites *Pacific States Box Co. v. White*, 296 US 176, 186, as authority for the contention stated above. This decision relates to the exercise of public power by an agent of the legislature and merely holds that existence of facts justifying the action is presumed. *Adams v. Nagle*, 303 US 532, is also cited. The pertinent portion of this decision is as follows (p. 542):

> Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he exceeded his jurisdiction by reason either of fact or law which induced his conclusion. Plainly therefore, the respondents are wrong in asserting that, as the facts set forth in their bill charge the comptroller with an error of law, he exceeded his authority.

Application of this rule to the present case requires the same conclusion as was reached by the court below, for section 336 does not vest discretion in the commission to act in the light of whatever facts it chooses to select, but prescribes and defines specific conditions under which changes in duty may be recommended. Further, the President is not authorized or directed to exercise his judgment as to the costs of production, but only his judgment as to whether the rates prescribed "are shown by such investigation of the commission" to be necessary. Therefore if the commission does not ascertain the facts specified in section 336 the President's proclamation is void.

As a second point petitioner argues (p. 18) that the commission committed no error in ascertaining foreign cost of production and that (p. 21) the decision below to a large extent nullifies the intention of Congress in enacting the flexible-tariff provision.

This argument is based upon the theory that the purpose of section 336 is to allow changes in duty which will equalize the differences in costs of production at the time the change becomes effective. However desirable this might be, it is indisputable that Congress required the commission to base its recommendation for increased duty upon costs of production ascertained, as in this case, by the "weighted average of the invoice prices or values for a *representative period*," and that when such costs are ascertained for one period and converted into dollars by the use of a rate of exchange in effect during some other period, the resultant dollar value is not the value for that representative period, and therefore does not show the statutory costs for that period.

Perhaps Congress should have delegated unrestricted power to the commission to ascertain the need for changes in duty in any manner it saw fit, but this was not done; and petitioner's argument must fail, for it evades the fact

that Congress in defining "cost of production" (sec. 336 (h) (4)) prescribed that, "when applied to either a foreign or domestic article, (it) includes *for a period which is representative of conditions in production of the article*" certain facts. Therefore when domestic costs are ascertained for one period, foreign costs may not be ascertained for an entirely different period, and foreign cost of production is certainly not ascertained "for a representative period" if such costs are converted into dollars by use of a rate of exchange which bears no relation to that period. There is only one way the commission's actions may be justified, and that is to disregard the requirements of section 336 and hold that Congress granted power to the commission and the President to change duties whenever in their judgment changes are required. This, however, is not the law.

Much is said by petitioner in apprehension that under the decision below the commission and the President would be effectively prevented from carrying out the purpose of the flexible-tariff provision in almost every case where currency fluctuation is a major factor (p. 24). That is not so. *The instant case is the only one where the commission utilized the method adopted here.* Also, the remedy, if any be required, is by legislative action such as was proposed in the hearings on HR 13999 referred to above, and by the commission in 1929 prior to enactment of section 336.

Petitioner also argues (p. 20) that, if the commission is required to convert foreign costs into dollars at the rates of exchange which prevailed during the period used to ascertain the foreign costs, "it will be utterly unable to perform its function of determining what change of duty will equalize the differences in costs of production at the time when the change becomes effective." As to this it is of interest to note the commission's action in another matter.

As shown by report 71, second series, entitled "Fish packed in oil," the commission recommended a change in duty shown necessary by differences in costs of production of tuna imported from Japan. This report to the President was dated October 30, 1933, when the yen was valued at .288 (Treasury Decision 46707), and it stated that the commission had selected the year 1932 as the representative period and had ascertained foreign costs of production during the 9 months ending August 31, 1932; also that (p. 2):

> The costs of production (as evidenced by invoice prices) of Japanese tuna, packed in oil, in terms of dollars, are affected by the rate of exchange of the yen for the dollar. Prior to December 15, 1931, the yen was substantially at par. Throughout the year 1932 the exchange value of the yen was materially depreciated with a general downward trend. *The invoice prices have been converted to dollars at the rate of exchange at the time of the respective shipments,* averaging about 55 per cent of par.

In that case the commission found that a raise of duty from 30 to 45 percent ad valorem was adequate to offset differences in production costs, but had the commission selected as a representative period the year 1931 (which was also covered by its investigation) it could have determined, by use of the rate of exchange in effect at the time of the report, that a much greater change in duty was required. (See values stated at page 20 of said report 71). *In other words, under the plan petitioner advocates the law becomes what the commission desires it to be, and not what Congress specified.*

Petitioner makes the following unsupported statement (p. 21):

> The Tariff Commission informs us that in the case of approximately 35 investigations made by the Commission under section 336, currency fluctuation has

been an important element in determining the action recommended. Increases in duty have been proclaimed on 13 articles when the currency of the principal competing country was below par in terms of United States dollars. In the case of 8 of these 13 articles, Japan was the principal competing country and in each instance the increase was found necessary after Japan went off the gold standard.

Respondent does not concede the propriety of this reference to matter which is not in evidence and which may not be judicially noticed. In any case it should be given very little consideration, when viewed in the light of printed commission reports of which judicial notice may be taken. *United States v. Best*, 24 CCPA 220, reviewing authorities. Counsel for respondent has examined 62 of the entire 67 reports made to the President under section 336 (see appendix, pp. xxii-iv), in order to ascertain whether the procedure adopted here was used in other investigations. The remaining five reports are not available to counsel, but, as shown by the Presidential proclamations, three of them—No. 5, wire netting; No. 6, wood flour, and No. 7, maple sugar—do not relate to Japanese merchandise, but to German, Norwegian and Canadian products. (See Presidential proclamations, TD 44602, TD 46604 and TD 44605.) The other two—No. 10, wool floor coverings, and No. 11, ultramarine blue—pertain to commodities where no presidential proclamation was issued.

Of these 67 investigations only eleven related in whole or in part to Japanese commodities, as follows:

No. 57, crab meat
No. 63, shoes
No. 71, fish in oil
No. 77, grass rugs
No. 79, cotton fish nets
No. 81, tooth brushes
No. 84, clams

No. 107, frozen swordfish
No. 108, wool knit gloves
No. 112, cotton cloth
No. 113, slide fasteners

a) As to crab meat (report 57) the commission found (p. 2) that the existing duty should not be changed. The "representative period" was from November, 1930 to November, 1931.

b) On shoes (report 63) the weighted average of the invoice prices were used as evidence of cost of production (p. 27), and although the exchange value of the yen decreased during the representative period from 49 to 20 cents (p. 14) the commission converted the prices *at the rates of exchange in effect on the dates of exportation* (p. 14).

c) As to fish in oil (report 71) *the same procedure was followed*, even though the value of the yen decreased during the representative period (January to August, 1932) from approximately 49 cents to 23 cents (p. 2-3).

d) In respect to grass rugs (report 77) costs of production were not ascertained, because of "disturbed conditions of production in the United States and foreign countries."

e, f) The same conclusion was reached as to cotton fishing nets (report 79, p. vi) and toothbrushes (report 81, p. vi). In this latter report a statement appears which contradicts petitioner's claim (p. 23 of brief) that "depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency." In this report the commission states (p. 7):

> The average unit value of the imports of toothbrushes of both groups fell abruptly in 1932 and the

early months of 1933, partly as a result of the depreciation of the Japanese yen. The average exchange rate of the yen for 1932 was 28.1 cents as compared with 48.8 cents (substantially par) in 1931, a decrease of 42 percent.

g) Report 84 is the one involved in the instant case on clams.

h) In reference to frozen swordfish (report 107) the commission selected June 1, 1933, to May 31, 1935, as the representative period, and stated (p. 2) that the weighted average invoice values were accepted as evidence of cost of production, and that "*practically all of the importations were invoiced in money of the United States.*" This serves to illustrate the fallacy of petitioner's argument that the decision below renders section 336 largely useless (p. 21), and that "in every investigation . . . foreign costs, as determined in foreign currency, must be translated into dollars for purposes of comparison with domestic costs" (p. 20). Foreign merchandise is frequently invoiced in American dollars, and in fact *the very importation covered by this petition was so invoiced* (R. 5). As to such invoices, all of petitioner's argument must fail unless it be held that the commission, after ascertaining in United States money the foreign costs through invoice prices, is privileged to revise such costs in any manner it chooses.

i) On wool knit gloves (report 108), the year 1935 was selected as the representative period. Invoice prices were accepted as evidence of foreign cost of production, and "were converted to United States dollars at the *current rate of exchange at the time of shipment*" (p. 3).

j) On cotton cloth (report 112) invoice prices from December, 1934 to April 1, 1935 were accepted (p. 4), and no statement was made in respect to conversion of currency. So presumably the commission followed its usual procedure and converted at the rates shown on the invoices.

k) The remaining report on Japanese articles is No. 113, on slide fasteners. Invoice prices for the last six months of 1935 were used, and were converted at the "*current rate of exchange at the time of shipment*" (p. 3).

In referring to these reports, counsel has assumed that the court may take judicial knowledge of such public documents, as held in *United States v. Best*, 24 CCPA 220, supra, and may thus observe that the statement by petitioner (pp. 2-3) as to the commission's actions in investigating Japanese products does not have the relevance or significance imputed by petitioner.

The balance of the commission's investigations related to merchandise from Austria, Bahama Islands, British India, Canada, Cuba, Czechoslovakia, France, Germany, Italy, Mexico, Morocco, Netherlands, Norway, Soviet Union, Switzerland, and United Kingdom. The reports are listed in the appendix, and as stated above all except five, which are not available, have been examined, and it has been found that, although invoice prices were frequently used as evidence of cost of production, these prices were not converted into dollars by use of an average exchange rate for a different period of time, as was done here, in report 59 on barley malt from Canada, but in that report no change in duty was recommended.

In reports 31 on boots and shoes, 34 on pens, and 36 on gauge-glass tubes, the commission stated that it was unable to ascertain the necessary facts, because of depreciated foreign currency, and consequently did not recommend changes in duty.

In report 64 on sperm oil the foreign costs were adjusted because of depreciated currency.

In report 32 on lumber the foreign costs were converted at the par value of the Canadian dollar even though a subsequent depreciation had occurred.

The above facts show that affirmance of the decision below will not, as stated by petitioner, render section 336 largely useless. They also serve to indicate the incompleteness of the statement (p. 23, petitioner's brief) that:

> The Tariff Commission informs us that in the case of approximately 35 investigations made by the commission under section 336, currency fluctuation has been an important element in determining the action recommended.

And they establish that the commission's action in the present case was unique.

On page 25 petitioner states that even if the construction placed on section 336 (e) (2) (a), by the court below, ie., that "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*," is correct, yet the provision is permissive in character, and therefore there was no violation of the statute. This argument is stated as follows (p. 25, emphasis added):

> The provision of section 336 (e) (2) *for use of the weighted average* of invoice prices or values for a representative period is permissive in character; the commission "may" accept such an average as "evidence" of the foreign costs of production "*insofar as it finds it practicable.*"

An examination of the statute shows that the above argument is not sound. Section 336 (e) provides that:

> In ascertaining under this section *the differences in costs of production*, the commission shall take into consideration, *insofar as it finds it practicable* . . .

Clearly the words "insofar as it finds it practicable," relate to ascertainment of *differences* in costs of production, and not, as stated by petitioner, to the acceptance of invoice prices as evidence of cost of production. There-

fore petitioner's further statement (p. 25) that, "the commission, having found that it was not *practicable* to use this method of conversion (R. 14), was under no statutory compulsion to do so," is unsupported by the statute.

XVI) **Conclusion**: It is respectfully submitted that the judgment of the court below should be affirmed on the grounds stated herein, or on the ground that the proclamation is invalid because based upon an unconstitutional statute.

San Francisco, April 11, 1940.

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(APPENDIX FOLLOWS)

Appendix

A) EXTRACTS FROM TARIFF ACT OF JUNE 17, 1930, C. 497, 46 STAT. 590, 19 USC 1336:

Sec. 336. Equalization of Costs of Production.

(a) *Change of Classification or Duties.*—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differ-

ences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) *Change to American Selling Price.*—If the Commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) *Proclamation by the President.*—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) *Effective Date of Rates and Changes.*—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) *Ascertainment of Differences in Costs of Production.*—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) *In the Case of a Domestic Article.* (A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to de-

livery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) *In the Case of a Foreign Article.* (A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) *Modification of Changes in Duty.*—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) *Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.*—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any

paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such article shall exceed the maximum ad valorem rate so specified.

(h) *Definitions.*—For the purpose of this section:

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

Sec. 402. Value.

(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

* * * * * * *

(c) *Foreign Value.*—The foreign value of imported merchandise shall be the market value or the price *at the time of exportation of such merchandise* to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(d) *Export Value.*—The export value of imported merchandise shall be the market value or the price, *at the time of exportation* of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities

and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(g) *American Selling Price.*—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

Sec. 481. Invoice—Contents.

(a) *In General.*—All invoices of merchandise to be imported into the United States shall set forth * * *.

(5) The purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of a purchase or an agreement to purchase;

(6) If the merchandise is shipped otherwise than in pursuance of a purchase or an agreement to purchase, the value for each item, in the currency in which the transactions are usually made, or, in the absence of such value, the price in such currency that the manufacturer, seller, shipper, or owner would have received, or was willing to receive, for such merchandise if sold in the ordinary course

of trade and in the usual wholesale quantities in the country of exportation.

Sec. 484. Entry of Merchandise.

(b) *Production of Certified Invoice.*—No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor, except that entry may be permitted if—

(1) The collector is satisfied that the failure to produce such invoice is due to causes beyond the control of the person making entry;

(2) Such person makes a verified declaration in writing that he is unable to produce such invoice and (A) files therewith a seller's or shipper's invoice, or (B) if he is not in possession of a seller's or shipper's invoice files therewith a statement of the value, or the price paid, in the form of an invoice; and

(3) Such person gives a bond for the production of such certified invoice within six months.

The Secretary of the Treasury may by regulations provide for such exceptions from the requirements of this subdivision as he deems advisable.

Sec. 485. Declaration.

(a) *Requirement—Form and Contents.*—Every consignee making an entry under the provisions of section 484 of this Act shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief.

Sec. 522. Conversion of Currency.

(b) *Proclaimed Value Basis of Conversion.*—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of enactment of this act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

B) EXTRACT FROM TARIFF ACT OF SEPTEMBER 21, 1922, C. 356, 42 STAT. 858, 922, 19 USC 121, 154:

Sec. 315. Tariff Act of 1922.

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall by such investigation ascertain said differences and determine and proclaim the changes in

classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of

this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2) and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal

markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results sub-

stantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

C) REPORTS TO THE PRESIDENT BY THE UNITED STATES TARIFF COMMISSION UNDER SECTION 336, TARIFF ACT OF 1930, SECOND SERIES.

Report No.	Subject	Chief competing country
5	Woven wire fencing and netting	Germany
6	Wood flour	Norway
7	Pigskin leather	Austria
8	Hats, bonnets, and hoods of straw	Italy
9	Maple sugar and sirup	Canada
10	Wool floor coverings	
11	Ultramarine blue	
12	Smokers' articles	France
13	Edible gelatin	Netherlands
14	Fourdrinier wires, woven-wire cloth, etc.	Germany
15	Wool-felt hat bodies and hats	Italy
20	Pipe organs	Canada
21	Cheese	Various European
22	Olive oil	Italy
23	Iron in pigs and iron kentledge	Germany, etc.
24	The bovine species	Not stated
25	Dried egg products	China
26	Hemp cordage	Italy
27	Bells, chimes, and carillons	Germany
28	Bent-wood furniture	Czechoslovakia
31	Boots and shoes	United Kingdom, and Czechoslovakia
32	Lumber	Canada
33	Cylinder, crown, and sheet glass	Belgium
34	Pens	United Kingdom
35	Crin vegetal, flax upholstery tow, etc.	Morocco
36	Gauge-glass tubes	United Kingdom
37	Feldspar	Canada.
38	Cement	Belgium
39	Fresh vegetables	Mexico and Cuba
40	Pineapples	Cuba
47	Umbrellas and umbrella frames and skeletons	France
48	Infants' wool knit outerwear	United Kingdom

Report No.	Subject	Chief competing country
49	Furniture of wood	Canada
50	Silicon aluminum, aluminum silicon, etc.	Switzerland
51	Sponges	Cuba and Bahama Islands
52	Inedible gelatin, glue, glue size, etc.	Germany
53	Cocoa-fiber mats	British India
54	Optical fire-control instruments	Germany
55	Precision drawing instruments and parts	Germany
56	Upholsterers' nails, chair glides, etc.	Germany
57	Crab meat	Japan
58	Folding rules, aluminum and wooden	Germany
59	Barley malt	Canada
60	Blown-glass tableware	Czechoslovakia
63	Rubber-soled and rubber footwear	Japan and Czechoslovakia
64	Sperm oil and spermaceti wax	Canada
66	Agricultural hand tools	Germany
68	Cotton velveteens and velvets	Germany
71	Fish packed in oil	Japan and Norway
73	Sugar	Cuba
74	Candied, crystallized or glace fruits	France
75	Meat and food choppers	Czechoslovakia
76	Cotton ties	Germany
77	Grass and straw rugs	Japan
78	Pins	Germany
79	Cotton fishing nets and nettings	Japan and Holland
80	Cut flowers	Canada and Netherlands
81	Tooth and other toilet brushes	Japan
82	Laminated products	Germany
84	Canned clams	Japan
98	Beer	Canada
107	Frozen swordfish	Japan
108	Wool knit gloves and mittens	Japan
110	Plate glass	Belgium
112	Cotton cloth	Japan
113	Slide fasteners and parts thereof	Japan
122	Dressed or dyed furs	Soviet Union